

ARTHUR COX

How do you successfully leverage available flexibilities in the new Procurement Bill and so maximize lawful contract agility in future procurements?

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INTRODUCTION

Lawful Contract Agility

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Changing Contracts to allow for different circumstances

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Permitted Modifications

Procurement Bill

Regulation 72 Public Contracts Regulations 2015

PROCUREMENT BILL

Sections 74 to 77

Schedule 8

Slight difference in focus in language

Looks at nature of change overall as part of exceptions rather than test for 'substantial' first

PROCUREMENT BILL – SECTION 74(1)

“(1) A contracting authority may modify a public contract or a contract that, as a result of the modification, will become a public contract (a “convertible contract”) if the modification—

(a) is a permitted modification under Schedule 8 (permitted modifications),

(b) is not a substantial modification, or

(c) is a below-threshold modification.”

PROCUREMENT BILL - SECTION 74(3)

“(3) A “substantial modification” is a modification which would—

(a) increase or decrease the term of the contract by more than 10 per cent of the maximum term provided for on award,

(b) materially change the scope of the contract, or

(c) materially change the economic balance of the contract in favour of the supplier.”

PROCUREMENT BILL - SECTION 74(5)

“a reference to a modification changing the scope of a contract is a reference to a modification providing for the supply of goods, services or works of a kind not already provided for in the contract.”

Relaxation on economic balance in favour of contractor?

PROCUREMENT BILL - SECTION 74(4)

“(4) A modification is a “below-threshold modification” if—

(a) the modification would not itself increase or decrease the estimated value of the contract by more than—

- (i) in the case of a contract for goods or services, 10 per cent;
- (ii) in the case of a contract for works, 15 per cent,

(b) the aggregated value of below-threshold modifications would be less than the threshold amount for the type of contract,

(c) the modification would not materially change the scope of the contract, and

(d) the modification is not within subsection (1)(a) or (b).”

PROCUREMENT BILL - SECTION 74(6)

“(6) For the purposes of subsection (4), the “aggregated value of below-threshold modifications” is the amount of the estimated value of the contract after modification that is attributable to below-threshold modifications.”

PROCUREMENT BILL – SCHEDULE 8

Schedule 8, sets out 7 categories of 'permitted modifications'

1. Provided for in the contract
2. Urgency and the protection of life, etc
3. Unforeseeable circumstances
4. Materialisation of known risk
5. Additional goods, services or works
6. Transfer on corporate restructuring
7. Defence authority contracts

PROVIDED FOR IN THE CONTRACT

“1 A modification is a permitted modification if—

(a) the possibility of the modification is unambiguously provided for in—

(i) the contract as awarded, and

(ii) the tender or transparency notice for the award of that contract, and

(b) the modification would not change the overall nature of the contract.”

CURRENT REGULATION 72(1)(a) TEST

“(a) where the modifications, irrespective of their monetary value, have been provided for in the initial procurement documents in **clear, precise and unequivocal review clauses**, which may include price revision clauses or options, **provided that** such clauses—

(i) **state the scope and nature** of possible modifications or options **as well as the conditions** under which they may be used, and

(ii) do not provide for modifications or options that would alter the overall nature of the contract or the framework agreement;”

MATERIALIZATION OF A KNOWN RISK

“5 (1) A modification is a permitted modification if—

- (a) the contracting authority considers that—
 - (i) a known risk has materialised otherwise than as a result of any act or omission of the contracting authority or the supplier,
 - (ii) because of that fact, the contract cannot be performed to the satisfaction of the contracting authority,
 - (iii) the modification goes no further than necessary to remedy that fact, and
 - (iv) awarding a further contract under Part 3 (instead of modifying the contract) would not be in the public interest in the circumstances, and
- (b) the modification would not increase the estimated value of the contract by more than 50 per cent ignoring, for the purpose of estimating the value of the contract, the fact that the risk has materialised.

(2) Sub-paragraph (1)(b) does not apply if the contract being modified is a utilities contract.”

MATERIALIZATION OF A KNOWN RISK

“6 In paragraph 5, a “known risk” means a risk that—

- (a) the contracting authority considered—
 - (i) could jeopardise the satisfactory performance of the contract, but
 - (ii) because of its nature, could not be addressed in the contract as awarded, and
- (b) was identified in the tender or transparency notice for award of the contract, including by reference to—
 - (i) its meeting the description in paragraph (a), and
 - (ii) the possibility of modification under paragraph 5.

7 In considering whether awarding a new contract would be in the public interest for the purposes of paragraph 5, a contracting authority—

- (a) must consider whether a new contract could provide more value for money, and
- (b) may consider technical and operational matters.”

SUMMARY

Main potential benefits:

- Potential relaxation of Permitted Contract Grounds;
- New Materialisation of known risks grounds

However, continued need to:

1. consider what might happen; and
2. capture so far as possible within procurement documents and contract (including optional extensions?)

NB: Final version of legislation still awaited.

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